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No. 84-836

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

DANIEL VASQUEZ, Warden of
San Quentin State Prison,

Petitioner,

v.

BOOKER T. HILLERY, JR.,

Respondent.

On Writ Of Certiorari
To The United States Court of Appeals
For The Ninth Circuit.

RESPONDENT'S BRIEF ON THE MERITS

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QUESTIONS PRESENTED

1. Respondent had exhausted his State remedies and the evidence presented to the District Court did not significantly change the evidentiary basis of the claim which had previously been presented to the State Courts.

2. The District Court properly applied the *Per Se* rule of reversible error once the State failed to rebut Respondent's prima facie case of discrimination in the Grand Jury selection process.

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OPINIONS BELOW

Respondent concurs in Petitioner's "OPINIONS BELOW" statement and incorporates it as though fully set forth herein.

JURISDICTION

Respondent concurs in Petitioner's statement of "JURISDICTION" and incorporates it as though fully set forth herein.

CONSTITUTIONAL PROVISIONS INVOLVED

Respondent concurs in Petitioner's statement of "CONSTITUTIONAL PROVISIONS INVOLVED" and incorporates them as though fully set forth herein.

STATEMENT OF THE CASE

Respondent concurs in Petitioner's "STATEMENT OF THE CASE" and incorporates it as though fully set forth herein, including footnote 1, page 4, which discusses the designators for the various transcripts. These designators will be followed throughout this brief. In addition, the designator RTA will be used to designate the reporter's transcript on appeal to the United States Court of Appeals for the Ninth Circuit.

STATEMENT OF PERTINENT FACTS

A. Facts Presented To The California Courts.

On June 27, 1962, Booker T. Hillery was indicted by the Grand Jury of Kings County, California, with violation of California Penal Code section 187, Murder. The indictment charged that on or about the 21st of March, 1962, Booker T. Hillery, did willfully and feloniously murder Marlene Miller (CT 1).

On July 16, 1962, Hillery, through his attorney, Hugh Goodwin, made a motion to quash the indictment. The

motion alleged that members of Hillery's race (Black) had been systematically and purposefully excluded from the Grand Jury which indicted him (CT 26, 28). Hillery's motion was heard, considered and on July 31, 1962, denied (CT 41).

At the hearing on the motion the following information was presented to the Superior Court.

1. Witnesses were called by Hillery to testify to their knowledge as to whether or not Blacks had ever served on a Grand Jury in Kings County California (RT 17 through 100). The testimony covered the years 1916 through 1962 and none could remember knowing or talking to any members of a Grand Jury in Kings County who were Black.

2. Judge Meredith Wingrove stated that he alone selected the members of the Grand Jury from 1956 through 1962 and in 1962, he had found a qualified Black (Mr. Welcher) he could appoint to the Grand Jury panel however, because of Mr. Welcher's employment he did not feel it appropriate to make the appointment. (RT 64).

3. An affidavit by Alice Hanna, Kings County Librarian, was submitted by the District Attorney of Kings County which contained data based on official United States Bureau of Census Statistics for Kings County for the years 1910, 1920, 1930, 1940, 1950 and 1960 (CT 39). These figures told the Court how many Black people lived in the county and what percentage of the total population they accounted for. This affidavit was submitted by the District Attorney to counter the affidavit submitted by Hillery (RT 57 through 59). At RT pages 58 and 59 the District Attorney suggested the Court determine under the affidavits, whether or not these figures constituted a substantial percentage (of Blacks), whether they were qualified and whether the qualified represented

a substantial percentage of the percentage of the Negroes of the total population.

4. The District Attorney presented no evidence to show that Blacks had served on Grand Juries in Kings County California during the entire history of the County since 1893.

On July 31, 1962, the motion was denied (CT 41).

On November 16, 1962, the trial jury returned a verdict of guilty as to the charged offense (CT 75).

In January of 1978, following his appeals from his conviction, Hillery filed a Habeas Corpus petition in the Superior Court of Marin County, California, alleging that Blacks had been excluded from the Grand Jury which indicted him (CR 1). This Habeas petition was ultimately referred to the California Supreme Court where it was denied on April 18, 1978 (CR 1). The California Supreme Court issued its opinion which discussed the evidence presented *supra*, including a statement to the effect that the People did not dispute the fact that no Negro had served on a Grand Jury in Kings County since its inception.

With his State remedies exhausted, he then filed a Title 28, Section 2254 petition in the United States District Court for the Northern District of California on May 22, 1978 (CR 1). On October 31, 1978, the case was transferred to the United States District Court for the Eastern District of California (CR Clerks Index).

On January 31, 1979, the Honorable Thomas J. MacBride, Chief Judge of the United States District Court for the Eastern District of California, issued a Memorandum, ordering that Hillery be permitted to proceed *in forma pauperis* and further ordering that the State of California

respond by show cause order why the petition for writ of habeas corpus should not be granted on the ground that Hillery was denied equal protection of the laws due to the systematic exclusion of Blacks from the grand jury which indicted him (CR 2).

In its response to Chief Judge MacBride's order, the State of California admitted that Hillery had exhausted his State remedies (CR 4).

After a series of motions were filed and ruled on, see Statement of the Case, *supra* the Honorable Lawrence K. Karlton, Chief Judge, Eastern District of California, replacing Chief Judge Thomas J. MacBride, who had retired to Senior status, ordered an evidentiary hearing on the matter. His published opinion is dated March 9, 1982 (CR 39). *Hillery* v. *Pulley,* (E.D. Cal. 1982), 533 F. Supp. 1189.

B. Facts Presented To The Federal Courts.

1. Hillery called Joshua E. Richardson, Evvie Edwards and Oliver F. Folsom to testify as to their knowledge of whether there were qualified Blacks eligible to serve on the Kings County Grand Jury between the time of their arrival in Kings County and 1962. In substance, their testimony was that there were eligible Blacks that could have served on the grand jury but they were never selected (CR 70).

2. Their testimony was corroborated by the deposition testimony of Bessie Welcher and Anne Cole (CR 51, 52), which were taken approximately one week after the evidentiary hearing was held.

3. Hillery utilized the testimony of Mr. Donald Parkyn, a forensic actuary, who testified that based on his probability analysis, there was very little probability that 62 all non-Black grand juries could have been selected in

Kings County between the years 1900 and 1962. Mr. Parkyn's analysis was based on Decennial census data for the years 1900 through and including 1970. The data was provided to him by Hillery's counsel. (RTA 146 and following).

4. The State cross-examined Mr. Parkyn regarding his findings but did not produce an independent expert of its own to refute the findings and analysis of Mr. Parkyn. The State called no witnesses to the stand on their behalf except Mr. Parkyn whom they attempted to use as their expert on recall to the stand (RTA 146 and following).

5. The State produced no evidence to establish that Blacks had served on Grand Juries in Kings County for the years in question.

6. In addition to the foregoing, the District Court had all of the facts which had been presented to the California Courts.

Based on the evidence produced at the hearing together with the deposition testimony, the United States District Court, in a published opinion, granted Hillery's application for a writ of habeas corpus (CR 56), *Hillery* v. *Pulley,* (E.D. Cal. 1983) 563 F. Supp. 1228.

The State of California appealed the decision to the United States Court of Appeals for the Ninth Circuit who affirmed the decision of the District Court in a two-to-one decision. *Hillery* v. *Pulley,* Slip Opinion No. 83-2017 (9th Cir. 1984, For Publication), attached as Exhibit B to the Petition for Writ of Certiorari. J. Blaine Anderson, Circuit Judge, dissented on the basis that Hillery had not exhausted his state remedies.

The State of California filed a petition for re-hearing and re-hearing in banc in the United States Court of

Appeals for the Ninth Circuit which was denied on September 12, 1984.

ARGUMENTS

I

INTRODUCTION

Respondent takes the position that an orderly analysis of Petitioner's claim requires that the so-called "expansion doctrine" under Rule 7(b) of the rules applicable to a Title 28 Section 2254 motion be examined first. This would be followed by an analysis of the application of the *Per Se Rule* versus the *Harmless Error Doctrine* to a case of proven discrimination in the selection of a grand jury.

Respondent asserts that if the Court holds that the District Court erred in applying the expansion doctrine under Rule 7(b), then the law to be applied to the claim of discrimination never arises because the case would be referred back to the California State Courts for further analysis. The law to be applied to the discrimination claim can arise only if this Court decides that Rule 7(b) was properly applied by the District Court. See *Picard* v. *Connor*, 44 U.S. 270 (1971).

Petitioner's "Brief On The Merits," at page 46, suggests that Hillery waited twenty years before filing his habeas petition in the Federal Courts. Nothing could be farther from the truth. An examination of the record demonstrates that Hillery filed his first habeas petition in the Marin County Superior Court on January of 1978 following his appeals from his original conviction. Further, it must be remembered that there were three penalty phase trials, all of which went through the appellate process. The fact is that Hillery was required to take that much time to exhaust his state remedies. The problem of the

delay in filing is considered in *Hillery* v. *Sumner*, 496 F. Supp 632 (1980) (E.D. Cal.) at page 634 and following.

Petitioner expends a considerable amount of time detailing and discussing the evidence presented to the trial jury in an effort to convince this Court that the "evidence of guilt is overwhelming" and there is no claim of innocence. Respondent believes there is no such standard applicable to the claim presented. The standard used by the trial jury to convict Hillery was the usual "proof beyond a reasonable doubt" and all appeals on the guilt issue have been exhausted. Hillery can no longer claim innocence by way of this or any other legal process. Therefore, it appears that petitioner is requesting this Court to fashion a new standard of review when examining the claim of discrimination in the grand jury selection process. That standard would take the form of a review of all the evidence presented to the trier of fact by the reviewing court in addition to his claim of innocence. If the reviewing court decided that the evidence reviewed exceeded the "proof beyond a reasonable doubt" standard and entered into the realm of "overwhelming," then the fact of proven discrimination in the grand jury proceedings would have no relevancy because any error would be "harmless" as it relates to the fairness of the trial and the failure to assert a claim of innocence.

The fact of the conviction is properly before this Court and that conviction is not challenged in these proceedings. The standard by which the trial jury convicted Hillery is not challenged in these proceedings. The volume of evidence, substantial or not, is not in issue in these proceedings. Simply stated, the "per-se rule" applied by the District Court to the proven claim of discrimination did not concern itself with either the volume or type of evidence presented which resulted in the conviction nor any

claim of innocence, but rather, supplied the applicable legal remedy to a proven Constitutional violation.

II

RESPONDENT HAD EXHAUSTED HIS STATE REMEDIES AND THE EVIDENCE PRESENTED TO THE DISTRICT COURT DID NOT SIGNIFICANTLY CHANGE THE EVIDENTIARY BASIS OF THE CLAIM WHICH HAD PREVIOUSLY BEEN PRESENTED TO THE STATE COURTS

Hillery filed the petition under consideration herein on May 22, 1978, and Chief Judge MacBride issued his Show Cause Order on January 31, 1979. Judge MacBride held that Hillery had made out a prima facie case of discrimination in the selection of the Grand Jury which had indicted him for murder.

In its Return to the Order, filed on May 22, 1979, the State, in its verified answer, admitted that Hillery had exhausted his state remedies. See CR 2, Paragraph II. The State agreed that the habeas petition filed in the District Court raised the "same issue(s) now raised were denied in ___ the California Supreme Court (see Petition, p. 3)." Therefore, the State admits that the *claim* remained the same in the Title 28 USC, section 2254 proceedings as it had in the State proceedings.

The evidence which supported the *claim* in the State Courts included (1) census data from 1910 through 1960; (2) testimony from at least two witnesses to the effect no Blacks had ever served on a grand jury in Kings County; (3) Judge Wingrove's statements on how the grand jury was selected; (4) affidavits from the County Librarian; (5) the percentage of Blacks in the total population for the years included in the census data; (6) No evidence from the District Attorney disputing the allegation that no Black had ever served on a grand jury in Kings County; (7)

that in 1960 Blacks constituted approximately 5% of the population in Kings County; (8) Judge Wingrove's statement that he had never selected a Black for grand jury service from 1956 to 1962. Further, the Supreme Court of California discussed the state of the record in its opinion in *People* v. *Hillery*, 62 Cal 2d. 692, 709 (1965), *cert. denied* 386 U.S. 938 (1967).

When Chief Judge Lawrence K. Karlton took over the case on the retirement of Chief Judge Thomas J. MacBride, he concluded that the case was properly before the District Court because of the State's admission that the State Court remedies had been exhausted. He further concluded that it was necessary to supplement and clarify the record in accord with Rule 7, 28 U.S.C. foll. Section 2254. *Hillery* v. *Pulley*, 533 F. Supp. 1189 (1982) (E.D. Cal.) at page 1198 and following. In order to establish a prima facie case under the "rule of exclusion" it must be established that the excluded group must also constitute a substantial segment of the population. *Norris* v. *Alabama*, (1935) 294 U.S. 587; *Hernandez* v. *Texas*, (1954) 347 U.S. 475, at 480.

Pursuant to Rule 7(a) of the rules governing Section 2254 cases, the District Court Judge has the power to expand the record to include additional materials which would be relevant to the Court in determining the merits. It is Rule 7(b) which controls the degree to which a record may be expanded and includes, *without limitation* letters pre-dating the filing of the petition in the District Court, documents, exhibits, answers under oath propounded by the Court, and affidavits may be submitted and considered as part of the record. See *Turner* v. *Chavez*, 586 F.2d 111, 113 (9th Cir. 1978).

The Advisory Committee, in its notes, discusses the rationale for the expanded record. It could eliminate the

petition; it could establish the requirement for an evidentiary hearing and it could eliminate unnecessary hearings.

After the State had made a motion to dismiss the original petition pursuant to Rule 9 based on the premise that an expansion of the record could not have been reasonably anticipated, Chief Judge Karlton responded in *Hillery* v. *Sumner*, 496 F. Supp. 632, 635 (1980) as follows:

> "Essentially, respondent's argument is one of 'surprise.' . . . Such an argument cannot prevail, for there could be no surprise. The power of inquiry on federal habeas corpus is plenary. *Townsend* v. *Sain*, (1963) 372 U.S. 293, 312, 83 S.Ct. 745, 756, 9 L.Ed. 2d 770. Although the state court records are generally all that is before the court at the time the return is filed (see Rule 6(b)), the court's consideration of the alleged constitutional violation is not confined to the state court record; the court's power to take evidence relevant to an allegedly unconstitutional detention has been repeatedly upheld. Id. at 311, 83 S.Ct. at 756; *U.S. ex rel. Barksdale* v. *Blackburn*, (5th Cir. 1980) 610 F.2d 253, 259. If, as petitioner alleges, he did not receive a full and fair evidentiary hearing in the state court, a hearing in this court is mandated (Id. at 312; 28 U.S.C. Section 2254(d); moreover, in other cases it is within the court's discretion to take evidence bearing upon the applicant's claim. *Townsend* v. *Sain*, *supra*, 372 U.S. at 318, 83 S.Ct. at 759."

Once the Court has determined that expansion of the record would be of value in deciding whether to go forward or not, and sets forth the items requested, copies of all documentation are to be submitted to the party against whom they are offered. See Rule 7(c) of the rules. Rule 7(c) further states that the option available to the party against whom these documents are offered is the opportunity to *admit or deny their correctness*. The State of

California did not exercise either of these options but merely objected to the entire proceeding and attempted to restrict the Court to the bare record of the State courts.

If Rule 7 is to have any meaning at all, then the District Court cannot be bound only by the information found in the State Court record. It must have the power to expand the record so long as no *new claims* are presented and the "new evidence" does not work a *fundamental change upon the claim*. *Nelson* v. *Moore*, 470 F.2d at 1197, cert. denied, 412 U.S. 951; *Domaingue* v. *Butterworth*, 641 F.2d 8, 12 (1st Cir. 1981); *Daniels* v. *Nelson*, 453 F.2d 340, 342 (9th Cir. 1972); *Schiers* v. *California*, 333 F.2d at 175; *Hall* v. *Sumner*, 512 F. Supp. 1014, 1017 (N.D. Cal 1981). Hillery must have presented to the State Court essentially the same *claim* as that presented to the District Court. *Picard* v. *Conner*, *supra*.

In the "expanded record," the State did not admit or deny the accuracy or validity of the data presented in accordance with Rule 7(c). Rather, it objected to introduction of any of the evidence on the basis that the material presented "new facts" which substantially transformed Petitioner's claim from that presented to the State Court. The *claim* presented to the State Court is identical to the claim presented to the District Court and has *never* changed, i.e. systematic exclusion of Blacks from the grand jury process. That claim began before Hillery's trial was commenced and has never changed. All the expanded record did was to provide a convenient analysis of the census data to assist the District Court in determining the merits of the claim which Respondent asserts is the real purpose for the existence of Rule 7. In fact, Chief Judge Karlton expressed some dismay over the fact that the State did nothing to assist the Court in determining the

merits of the claim. Rather, the State adopted an obstructionist attitude. See *Hillery* v. *Pulley*, 563 F. Supp. 1228 (1983), footnote 7, where the Court states:

> ". . . The figures used by Petitioner's attorney and the method employed, as well as the calculations themselves, are not dependent on the credibility of the witness, and are subject to direct verification or impeachment by the State. They stand unrefuted in the record."

Footnote 16 of the same opinion states:

> "Respondent's failure to present expert statistical analysis is baffling. Earlier in this proceedings, Respondent stated in an answer to an interrogatory that a statistical expert was in the process of being retained."

The District Court had before it all of the evidence presented to the California Courts. With that in mind, what change did the use of the computer analysis and the testimony of the witnesses work on the evidence already before the District Court? Chief Judge Karlton examined the problem in *Hillery* v. *Pulley*, 533 F.Supp. 1189 *supra*, and held as to the mathematical calculation that:

> "Thus, the statistical analysis of census data is not in and of itself dispositive of the legal issue before the court. Therefore, to the extent that respondent argues that such evidence works a fundamental change upon petitioners claim because it is of a dispositive nature, the state is incorrect. More importantly, however, is the fact that respondents arguments misconstrue the nature of the evidence in question. The testimony proferred by petitioner is simply an expert analysis already before the court and is not, in this sense, "new evidence." In this regard it seems relatively clear that the statistical analysis of census data is the kind of information designed to make the facts relative to the absence of

> blacks on grand juries significant, i.e. to aid the trier of fact in understanding the evidence before the court. . . . The statistical analysis of census data is, therefore, an interpretive aid for use by the court rather than 'new evidence' as it is characterized by respondent. It is precisely this type of analysis which must be considered by the Federal Court in performing its duty of independently applying Federal law to the facts as found by the state court. Accordingly the court holds that the introduction of the analysis of census data does not so fundamentally change the character of petitioners claims that he must return to the state courts." *Hillery* v. *Pulley, supra*, 1202 and 1203.

See also *Alexander* v. *Louisiana*, 405 U.S. 625, 92 S.Ct. 1221, 31 L.Ed. 2d 536 (1972) and *Castaneda* v. *Partida*, 430 U.S. 482, 97 S.Ct. 1272, 51 L.Ed. 498, (1977) where the Court used statistical analysis in determining whether systematic discrimination existed.

The data presented to the District Court in response to the direction of that Court merely expanded the understanding of the data which had been previously pesented to the State Courts.

In response to the State's objection, the District Court addressed itself to the use of the witness testimony in the District Court relative to the competence of blacks to serve as grand jurors and concluded that this testimony was merely *cumulative* to the testimony and evidence which had been presented to the California Courts by different witnesses on the same subject reaching the same conclusion; that there were Blacks eligible for grand jury service for the times in question and that none were selected. *Hillery* v. *Pulley, supra*, page 1202.

If this Court were to restrict Rule 7 to a review of the material presented to the State Courts without the right

to look at that same data from a different perspective, thus denying to the District Court the right to expand the record in accordance with prior Supreme Court decisions, then the "expansion doctrine" of Rule 7 would cease to exist.

III

THE DISTRICT COURT PROPERLY APPLIED THE *PER SE* RULE OF REVERSIBLE ERROR ONCE THE STATE FAILED TO REBUT RESPONDENT'S PRIMA FACIE CASE OF DISCRIMINATION IN THE GRAND JURY SELECTION PROCESS

Respondent submits that Hillery has fully exhausted his State remedies; has proven that discrimination in the selection of the grand jury existed; and, therefore, the issue of the application of the "per se rule" of reversible error versus the "harmless error" doctrine is now properly before this Court.

In simple terms, the State is asking this Court to overturn approximately 100 years of case law relative to proved discrimination in the grand jury selection process.

> "For nearly a century, this Court in an unbroken line of cases has held that 'a criminal conviction of a Negro cannot stand under the Equal Protection Clause of the Fourteenth Amendment if it is based on an indictment from which Negroes were excluded by reason of their race.'" *Rose* v. *Mitchell*, 443 U.S. 545 (1979).

In *Rose* v. *Mitchell*, *supra*, if the Court had found that discrimination in the selection of the Grand Jury had occurred it would have overturned the conviction. Failure of the claimants to establish a case of discrimination resulted in the Court denying the relief sought.

Respondent does not present the problem presented to the *Rose* Court because Respondents claim of discrimination was established and *not rebutted*. It is proven and therefore, the claim of discrimination is not before this Court for determination. Once the prima facie case of discrimination was established by Respondent and not rebutted by the State, the District Court had no choice but to follow the dictates of the long line of Supreme Court cases and set the conviction aside.

If the Court holds that the error in this case is "harmless," it is Respondent's position that the Court will have removed a fundamental due process and equal protection right as guaranteed under the Fifth and Fourteenth Amendments to the United States Constitution.

Petitioner attempts to develop arguments which emanate from Justice Jackson's dissent in *Cassell* v. *Texas*, 339 U.S. 282 (1950) and Judge Friendly's Law Review Article in 38 U. Chi. L. Rev. 142, both of which discuss the development of the "Harmless Error" doctrine in those cases where there was proved discrimination in the Grand Jury process followed by a proper conviction on the merits. This Court in *Rose*, *supra*, analyzed and discussed those same arguments and Justice Blackmun, in rendering the opinion of the Court, found that there was a fundamental difference between discrimination in the selection of the grand jury and the Fourth Amendment exclusionary rule. Therefore, the Court concluded, in substance, that a personal constitutional right cannot be viewed in the same light as a judicially created remedy.

Petitioner cites *Hobby* v. *United States*, 468 U.S. ____, 104 S.Ct. 3093, 82 L.Ed. 2d 260 (1984), that there need not be an automatic reversal of the conviction where there was discrimination in the selection of a Federal Grand Jury foreman. *Hobby*, *supra*, was a Federal problem as opposed to a State problem. The selection of the foreman in *Hobby* was made by the Grand Jury members them-

selves and not by a Judge. Therefore, as Chief Justice Burger stated;

> "Under the federal system, by contrast, the foreman is chosen from among the members of the grand jury after they have been empaneled, see Fed. Rule Crim. Proc. 6(c); the federal foreman, unlike the foreman in *Rose*, cannot be viewed as the surrogate of the judge. So long as the grand jury itself is properly constituted, there is no risk that the appointment of any one of its members as foreman will distort the overall composition of the array or otherwise taint the operation of the judicial process." *Hobby* v. *U.S.*, *supra.*

Chief Justice Burger further emphasized the distinction between the selection of the grand jury foreman and the selection of the grand jury itself when he stated:

> "Discrimination in the selection of the grand jury foremen—as distinguished from discrimination in the selection of the grand jury itself—does not in any sense threaten the interest of the defendant protected by the Due Process Clause. Unlike the grand jury itself, the office of the grand jury foreman is not a creature of the Constitution; instead, the post of foreman was originally instituted by statute for the convenience of the court." *Hobby* v. *U.S.*, *supra.*

Respondent contends that the messages of the cases is quite clear. Where a court itself acts in a discriminatory manner in the selection of the grand jury, an indictment handed down by that grand jury against a member of the class discriminated against is judicially tainted. Further, the integrity of the judicial process is so impugned that any conviction obtained as a result of that indictment must be overturned because the error is "per se" reversible.

In short, Petitioner would have this Court ignore the Constitution in the present case, hold that the "Harmless

Error Doctrine" be extended to this type of claim, and reverse the District Court's granting of Respondent's application for a writ of habeas corpus. In Respondent's view, the District Court properly ruled in granting the writ of habeas corpus and for this Court to reverse the District Court's decision would work an incredible injustice not only on Respondent, but on our Constitutional system as a whole. See *Chessman* v. *Teets*, 354 U.S. 156, 165 (1957).

CONCLUSION

It is respectfully requested that this Court affirm the decisions of the United States District Court for the Eastern District of California, and the United States Court of Appeals for the Ninth Circuit in granting the Petition for Writ of Habeas Corpus under Title 28 U.S.C. Section 2254.

Respectfully submitted,

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